

## STATE STANDING AND COOPERATIVE FEDERALISM

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States increasingly litigate before the federal courts in lawsuits challenging national policy. Texas Attorney General (now Governor) Greg Abbott is famous for describing his typical day as follows: “I go into the office, I sue the federal government and I go home.”<sup>1</sup> Although the challenges over the last decade tended to come from the political right—including litigation over national healthcare, immigration, and discrimination policy—high-profile lawsuits have come from the political left as well. The leading Supreme Court decision on state litigation, *Massachusetts v. EPA*,<sup>2</sup> involved an effort by Massachusetts and eleven other States to force the Bush-era Environmental Protection Agency (EPA) to regulate greenhouse gases under the Clean Air Act. And states have been the lead plaintiffs in recent challenges to Presi-

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\* Alston & Bird Professor, Duke Law School. Many of the ideas in this Essay originated in a brief that I filed on behalf of a group of federal courts scholars as well as the Southeastern Legal Foundation in the Texas immigration case. See Brief of Amici Curiae Federal Courts Scholars and Southeastern Legal Foundation in Support of Respondents, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674) [hereinafter Brief of Federal Courts Scholars]. This Essay ranges considerably beyond that filing, however, and so nothing I say here should necessarily be imputed to the Foundation or the other signatories of that brief. I have also participated as amicus supporting Massachusetts’ standing to challenge the Trump administration’s expanded religious and moral exemptions to the Affordable Care Act’s contraceptive mandate. See Brief of Professor Ernest A. Young as Amicus Curiae in Support of Plaintiff-Appellant Urging Reversal, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, No. 18-1514 (1st Cir., Sept. 24, 2018), [https://scholarship.law.duke.edu/faculty\\_scholarship/3905/](https://scholarship.law.duke.edu/faculty_scholarship/3905/). I am grateful to the *Notre Dame Law Review* for the opportunity to participate in this Symposium, and to Lauren Jackson, Colleen O’Leary, and Mark Rothrock for excellent research assistance.

1 Sue Owen, *Greg Abbott Says He Has Sued Obama Administration 25 Times*, POLITIFACT (May 10, 2013), <http://www.politifact.com/texas/statements/2013/may/10/greg-abbott/greg-abbott-says-he-has-sued-obama-administration-/>.

2 549 U.S. 497 (2007).

dent Trump's executive orders restricting entry into the United States for persons from select countries.<sup>3</sup>

State lawsuits challenging federal policy generally encounter arguments that the states lack standing to sue, either under Article III's "case or controversy" clause or under various prudential standing doctrines.<sup>4</sup> These arguments have often taken novel forms—such as claims that states' injuries are "self-inflicted" or offset by other benefits of federal policies—that have few precedents or analogs in the standing jurisprudence governing suits by private individuals. The United States has taken the position, in other words, that states should have special disabilities in filing lawsuits that would not apply to ordinary litigants. Likewise, prominent academics have argued that uniquely narrow standing rules should govern states.<sup>5</sup> States frequently respond by arguing that their unique status as state governments confers special advantages when it comes to standing. In particular, they have relied upon the *parens patriae* doctrine, which allows them (sometimes) to sue to redress injuries to their citizens, or simply invoked *Massachusetts v. EPA*'s statement that states are entitled to "special solicitude" in standing analysis.<sup>6</sup>

Undergirding all of this doctrinal conflict is a broader worry that litigation between states and the national government is an inherently political enterprise. My colleague Walter Dellinger, formerly acting Solicitor General during the Clinton administration, argued that recognizing state standing to challenge the Obama administration "would open wide a back door to federal court for States seeking resolution of a host of politically charged disputes."<sup>7</sup> The claim seems to be that because states are themselves public and political actors, litigation by them against the national government is inher-

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3 Washington, Minnesota, and Virginia challenged the original travel ban in January of 2017. See Mark Dayton, *Judge Temporarily Halts Trump Travel Ban After Lawsuit from Wash., Minn.*, CBS MINN. (Feb. 3, 2017), <http://minnesota.cbslocal.com/2017/02/03/states-seek-halt-trump-travel-ban/>; Amanda Iacone, *Virginia Joins Suit Challenging Trump's Immigration Order*, WTOP (Jan. 31, 2017), <http://wtop.com/virginia/2017/01/virginia-sues-trump-administration-over-immigration-order/>. Seventeen additional states and the District of Columbia joined an amicus brief supporting Washington and Minnesota. See Brief of the States of Pennsylvania et al., and the District of Columbia as Amici Curiae States in Support of Plaintiffs-Appellees, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105) 2017 WL 564203.

4 See, e.g., *Massachusetts v. U.S. Dep't of Educ.*, 340 F. Supp. 3d 7 (D.D.C. 2018) (denying three states standing to challenge changes to the federal student loan forgiveness program).

5 See, e.g., Ann Woolhandler & Michael G. Collins, *Reining in State Standing*, 94 NOTRE DAME L. REV. 1015 (2019) [hereinafter Woolhandler & Collins, *Reining*].

6 *Massachusetts v. EPA*, 549 U.S. at 520.

7 See Brief for Professor Walter Dellinger as Amicus Curiae in Support of Petitioners at 4, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674), [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6283&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6283&context=faculty_scholarship) [hereinafter Dellinger Brief].

ently “political” in some way that litigation by ordinary private litigants is not.<sup>8</sup>

My own view is considerably more sympathetic to state standing. The general issue divides naturally into three distinct questions. First, when will states have standing to sue the national government under “ordinary” principles of standing law—that is, without any thumb on the scale, one way or the other, arising from their status as state governments? Part I answers this question by arguing that, even under ordinary standing principles, the responsibilities and prerogatives of state governments give them a broad range of interests that may be invaded or harmed by national action. In particular, the structure of modern cooperative federalism regimes—in which state governments typically work hand in glove with federal officials administering statutes like Medicaid or the Clean Air Act—mean that changes in federal policy will almost always meaningfully affect state interests. And even where federal regulation is not formally cooperative—as in immigration policy—the role of the states in policing and ensuring the well-being of persons within their jurisdictions will often cause federal policy changes to significantly impact states’ responsibilities. States are thus likely to enjoy broad standing even under ordinary Article III analysis.

The second question is whether states should have special disadvantages, unique to them, when they seek to establish standing to sue. Part II demonstrates that many standing arguments made against state litigation would not fly—and would never be raised—in litigation brought by private parties. Such arguments can be defended only on the ground that states should be uniquely disabled from challenging federal action. The best case for such disabilities rests on the notion that state litigation is inherently political and, therefore, should be nonjusticiable. But the political question doctrine has generally turned on the nature of the substantive claims being advanced, not the identity of the parties. And in any event, state litigation must be compared to its alternatives, not evaluated in a vacuum. I argue that hot-button political issues will be litigated by private organizations, class actions, and other mechanisms if not by states, and that states may compare favorably to private suits in important respects. The other alternative is to resolve these high-profile disputes outside the courts through political remedies. But recent experience suggests that such remedies—which include government shutdowns, refusals to confirm executive appointments, and even impeachment—are not necessarily preferable to litigation. In our polarized contemporary circumstances, it is time to reexamine our customary aversion to settling political questions in courts of law, as long as those questions are in fact governed by positive law.

The last question points in the opposite direction: Should states have special *advantages* in establishing standing? Part III suggests that the “special solicitude” recognized in *Massachusetts v. EPA* is actually narrower than is

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8 See, e.g., Woolhandler & Collins, *Reining*, *supra* note 5, at 2031 (suggesting that state public litigation inappropriately seeks to have courts adjudicate “policy disputes between governments”).

sometimes supposed. But I do argue that that state-based litigation provides a means of aggregating the interests of large numbers of individual persons and as such should be viewed as a potential alternative to class actions, multidistrict litigation, or broad organizational standing for nongovernmental entities like the Sierra Club. Viewed in this framework, state litigation has much to recommend it. Like any legal mechanism, state litigation can be—and perhaps has been—abused in particular cases. But the institutional and political checks and balances built into state litigation give reason to hope that it can be a positive component of our constitutional structure.

## I. STATE INTERESTS AND INJURIES

Article III's basic requirement for standing is both familiar and superficially simple: litigants must establish a concrete "injury in fact," caused by the challenged action and redressable by the requested relief.<sup>9</sup> The nature of the required injury, however, has proven elusive in practice. It is plainly, at least in part, a function of the underlying right that the plaintiff is asserting.<sup>10</sup> Taxpayers, for example, ordinarily lack standing to challenge federal programs involving expenditure of their tax dollars, but taxpayers may often assert claims under the Establishment Clause.<sup>11</sup> Standing is also partially a function of the identity of the party asserting that right. Third parties, for example, will have standing to assert the rights of others depending on their relationship with those others.<sup>12</sup> Moreover, the interests creating standing may arise from either federal or state law. If government action damages an individual's personal or real property, for example, the relevant property rights will generally be creatures of state law;<sup>13</sup> similarly, state referendum proponents' ability to defend their measure on appeal has depended on the degree to which state law empowers them to litigate state interests.<sup>14</sup> Differ-

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9 See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). See generally RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 101–32 (7th ed. 2015) [hereinafter HART & WECHSLER].

10 See, e.g., William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223–24 (1988).

11 Compare *Massachusetts v. Mellon*, 262 U.S. 447 (1923) (denying taxpayer standing to challenge a federal program that allegedly exceeded Congress's Article I powers), with *Flast v. Cohen*, 392 U.S. 83 (1968) (permitting a taxpayer to challenge the expenditure of federal funds to support religious schools). See generally HART & WECHSLER, *supra* note 9, at 127–29 (discussing the taxpayer standing cases).

12 See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); see also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (denying divorced father's standing to challenge a public school's requirement that his daughter recite the Pledge of Allegiance on the ground that, under state law, he was not the custodial parent).

13 See, e.g., *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .").

14 See *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

ent parties have different legal interests, the invasion of which can support standing under Article III.

States are large governmental entities with extensive responsibilities. Some of their interests are the same sorts of interests that private parties might assert—injuries to state property or breaches of state contracts, for example. Other interests arise from the states' uniquely governmental responsibilities, but they are not qualitatively different from private interests. An individual prevented by government regulation from doing something he is otherwise entitled to do will generally have standing to challenge that regulation, and a state prevented from exercising its ordinary prerogatives is in no different position—even if those prerogatives are public rather than private duties. The fact that states have broader prerogatives and responsibilities than most entities may give them standing in an unusually broad range of cases, but so does the fact that states own more property and enter into more contracts than most entities.

To say that state governments are likely to have broad standing based on their broad set of interests is not to propose any sort of “special” standing rule for state litigants. There may be reasons to recognize special standing rules for states in certain circumstances, as I discuss in Part III. But in many, if not most, cases the states' broad access to federal court is simply the result of applying standard standing doctrine to these litigants. As Professors Ann Woolhandler and Michael Collins acknowledge, “[t]he problem is not that states lack real injuries . . . . The problem [for opponents of state standing] is that states can easily satisfy the current standing tests.”<sup>15</sup>

#### A. Common Interests of States

States have many of the same interests that private parties do, and in many cases state litigation will look a great deal like private lawsuits.<sup>16</sup> States own property, for example, and they enter into contracts. In its leading *Alfred L. Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez* decision,<sup>17</sup> the Supreme Court classified these interests as “proprietary” in nature, noting that “[a]s a proprietor, it is likely to have the same interests as other similarly situated proprietors. And like other such proprietors it may at times need to pursue those interests in court.”<sup>18</sup> When states suffer injuries to these sorts of interests, they have no trouble establishing their standing to sue.<sup>19</sup>

One could wish for a better term than “proprietary” to describe these sorts of interests. The distinction between proprietary and governmental interests and actions is notoriously indeterminate, and the Supreme Court has tended to discard it in contexts where it had to bear any significant

15 Woolhandler & Collins, *Reining*, *supra* note 5, at 2024.

16 See Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 109–10 (2018).

17 *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982).

18 *Id.* at 601–02.

19 See, e.g., Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 406–07 (1995).

weight.<sup>20</sup> Two more specific problems undermine its usefulness for purposes of defining the interests of states in litigation. First, the term tends to disguise the extent to which these common interests can support litigation in the field of public law. And second, proprietary interests in property or contractual rights are hardly the only interests that states share in common with private entities.

Even narrowly understood proprietary interests may support important forms of public-law litigation against the national government.<sup>21</sup> For instance, in *Massachusetts v. EPA*,<sup>22</sup> the Bay State and several other state governments sought to force the EPA to regulate greenhouse gases under the Clean Air Act.<sup>23</sup> Although the Supreme Court's ruling on standing relied importantly on the Commonwealth's *sovereign* interests, the Court noted that "Massachusetts does in fact own a great deal of the 'territory alleged to be affected'" by climate change.<sup>24</sup> Likewise, state contractual interests include not only contracts with private individuals and businesses but also federal grants-in-aid programs whereby states agree to participate in the implementation of federal programs in exchange for federal funds.<sup>25</sup> States challenging federal decisions concerning those programs thus may often assert contractual interests as a basis for standing.<sup>26</sup> Much federal regulatory policy operates through such programs, and state litigation challenging federal adherence to the programs' statutory terms may thus have broad public significance.

Common interests that states share with private individuals and other nongovernmental entities include not only property and contractual rights but also interests in preventing unlawful interference with one's lawful freedom of action. If the President decided to reimpose the fifty-five miles per hour speed limit on the nation's highways by executive order, any driver sub-

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20 See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 543 (1985) ("The distinction [between 'governmental' and 'proprietary' functions] the Court discarded as unworkable in the field of tax immunity has proved no more fruitful in the field of regulatory immunity under the Commerce Clause.").

21 See generally Raymond H. Brescia, *On Objects and Sovereigns: The Emerging Frontiers of State Standing*, 96 OR. L. REV. 363, 370 (2018) ("[S]tates are well-positioned to allege private law harms even as they pursue public law claims.").

22 549 U.S. 497 (2007).

23 See *id.* at 505.

24 *Id.* at 519. It is hard to tell whether Massachusetts could have established standing based on this ownership interest alone. The real difficulty with Massachusetts's claim for standing involved the causation elements of standing. Because the causes of climate change are so multifarious and the likelihood that any given regulatory change would redress it is so murky, Massachusetts may have required "special solicitude" to get it over the causation hump. See *infra* Part III. But the Commonwealth's ownership interest should have been sufficient to support the requisite injury in fact.

25 See, e.g., *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (describing spending-power legislation as contracts between the federal and state governments); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (same).

26 See, e.g., *Bowen v. Massachusetts*, 487 U.S. 879 (1988) (suit to recover funds wrongfully withheld by federal authorities under federal Medicaid program).

ject to that speed limit would have standing to challenge the lawfulness of the order as a constraint on his otherwise-legal activities.<sup>27</sup> He would not have to assert some special “right” to drive fast; it would be enough that something that was previously lawful for him to do had been rendered unlawful, and that the means for doing so was arguably counter to the Constitution’s specified lawmaking criteria. And if the President’s order applied the same speed limit to law enforcement vehicles, the North Carolina Highway Patrol would have standing to assert the same claim on precisely the same ground. Likewise, if Congress mandated a national educational curriculum for primary school children, both private and public schools would have standing to challenge that law as exceeding Congress’s enumerated powers on the ground that it unlawfully constrained their freedom of action by requiring them to teach things they didn’t want to teach.

To be sure, the states’ interests in such cases are governmental interests in that a government has them, and the freedom of action in question is the freedom to do things that governments do. But many state functions—such as driving or teaching—are functions that both public and private entities engage in. And even government activities that lack private analogs still implicate the same principle—one is injured when unlawfully prevented from doing something one is otherwise lawfully entitled to do—that grounds private standing in a wide range of cases. This autonomy interest is no less common to public and private entities than property and contractual interests are. For that reason, I submit that it is more helpful to speak of “common” than of “proprietary” interests.

Critical state interests typically characterized as “sovereign” or uniquely governmental are hard to distinguish in principle from private interests in freedom of action. In *Havens Realty Corp. v. Coleman*, for example, the Court considered a claim by a public interest organization, Housing Opportunities Made Equal (HOME), against a realtor for engaging in racial steering in violation of the Fair Housing Act.<sup>28</sup> The Court held HOME to have standing in its own right—and not simply as a representative of its members—based on allegations that the defendant’s practices “have perceptibly impaired HOME’s ability to provide counseling and referral services for low- and moderate-income homeseekers.”<sup>29</sup> According to the Court, “[s]uch concrete and demonstrable injury to the organization’s activities—with the consequent drain on the organization’s resources—constitutes far more than simply a setback to the organization’s abstract social interests.”<sup>30</sup> The defendant’s actions, in other words, made it more difficult for HOME to carry out its

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27 The real fifty-five miles per hour speed limit was adopted as part of the federal Emergency Highway Energy Conservation Act, Pub. L. No. 93-239, § 2(b)(1), 87 Stat. 1046, 1046 (1974), a federal statute that conditioned federal highway funds to state governments on the states’ lowering of their speed limits.

28 *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

29 *Id.* at 379.

30 *Id.*

organizational mission, and hence “there can be no question that the organization has suffered injury in fact.”<sup>31</sup>

*Havens Realty* seems readily comparable to the interests asserted by Texas in its challenge to the Obama administration’s Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) policy, which significantly expanded the number of undocumented aliens who would be considered “legally present” in the United States.<sup>32</sup> Texas’s narrow argument for standing was that Texas law requires the Department of Public Safety to issue driver’s licenses to everyone who is lawfully present in the state. The fees don’t cover the full cost to the state, so that the state is out about \$100 for each person who applies for a license. Texas argued that if millions of additional persons were deemed to be lawfully present in Texas under the federal DAPA program, it would be injured by having to subsidize a large number of driver’s licenses.

On its face, this pecuniary injury ought to be a no-brainer for standing—after all, “economic injury is one of [the] paradigmatic forms” of injury in fact.<sup>33</sup> But it is equally important to recognize that Texas’s driver’s license argument was simply a particularly concrete example of DAPA’s broader impact upon the state’s activities. States have to govern—that is, they’re responsible for looking after all the people in their jurisdiction.<sup>34</sup> They do this in a wide variety of ways—protecting them from crime, educating their children, and, sometimes, issuing them driver’s licenses. Looking after people is expensive, and when federal action increased the number of people a state has to take care of, that put pressure on Texas’s governmental mission in much the same way that the discriminatory practices in *Havens Realty* put pressure on the housing rights organization.

Current challenges to the Trump administration’s new rules permitting religious and moral exemptions from the Affordable Care Act’s contraceptive mandate provide a similar example. The Commonwealth of Massachusetts has argued that, under its existing laws, it will be required to make up gaps in employees’ coverage for contraceptive expenses should their employers opt out of providing that coverage under the new rules.<sup>35</sup> The district court held

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31 *Id.*; see *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291 (3d Cir. 2005) (Alito, J.) (citing *Havens Realty* as an example of a “paradigmatic” injury in fact sufficient for standing).

32 See *Texas v. United States*, 86 F. Supp. 3d 591, 606, 678 (S.D. Tex.) (enjoining the injunction of the DAPA program and DACA program expansion), *aff’d*, 787 F.3d 733 (5th Cir. 2015), *aff’d per curiam by an equally divided court*, *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016).

33 *Danvers Motor Co.*, 432 F.3d at 291.

34 See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) (observing that states have an “easily identified” “sovereign interest[ ]” in “the exercise of sovereign power over individuals and entities within the relevant jurisdiction”).

35 *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 301 F. Supp. 3d 248 (D. Mass. 2018), *vacated*, 923 F.3d 209 (1st Cir. 2019). Pennsylvania and California have filed similar challenges. See *California v. Health & Human Servs.*, 281 F. Supp. 3d 806 (N.D. Cal. 2017), *aff’d in part, vacated in part, and remanded sub nom.* *California v. Azar*, 911 F.3d



that Massachusetts lacked standing—erroneously, in this author’s view<sup>36</sup>—because the Commonwealth had failed to establish with certainty how many employers would, in fact, avail themselves of the new opportunity to opt out.<sup>37</sup> But the court did not question that, if Massachusetts could in fact prove it would incur expenses in serving its population as a result of the new federal rule, those expenses would count as a valid injury in fact for standing purposes.

Neither of these claims to standing turns on an assertion that Texas had any “right” to control the number of people coming into its jurisdiction, or that Massachusetts had a right to have the federal government subsidize contraceptives for employees. Both states were obliged to show that their legitimate interests had been adversely impacted by an unlawful exercise of federal power. In each case, the primary claim was not that the federal policy in question could never be adopted, but rather that it had unlawfully been adopted through unilateral executive action or without respecting the procedural requirements of the Administrative Procedure Act (APA). As I discuss in the next Section, both of these claims do implicate foundational interests of the states in our contemporary political system. The critical point for present purposes, though, is that state claims raising those interests can often rest on concrete injuries closely analogous to those supporting claims by private parties.

Those analogies can hold even where the injury is not pecuniary in nature. The Supreme Court’s decision in *Snapp* recognized a “sovereign” interest in “both [a] civil and criminal” legal code.<sup>38</sup> This is presumably the interest that supports a government’s standing to bring criminal prosecutions; likewise, it supports a state government’s standing to appeal when it is enjoined or otherwise prevented from enforcing its laws.<sup>39</sup> But this interest, I submit, is simply a variant of the more general principle that a cognizable injury occurs whenever a person or entity is prevented from doing something that they are otherwise lawfully entitled to do.<sup>40</sup> A state government that

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558 (9th Cir. 2018); *Pennsylvania v. Trump*, 281 F. Supp. 3d 553 (E.D. Pa. 2017), *appeal docketed*, No. 18-1253 (3d Cir. Feb. 15, 2018).

36 See generally Brief of Professor Ernest A. Young as Amicus Curiae in Support of Plaintiff-Appellant Urging Reversal, *supra* note \*.

37 See *U.S. Dep’t of Health & Human Servs.*, 301 F. Supp. 3d 248. The Ninth Circuit and the Eastern District of Pennsylvania, by contrast, accepted a similar standing argument in the California and Pennsylvania cases. See *Azar*, 911 F.3d at 571–73; *California v. Health & Human Servs.*, 281 F. Supp. 3d at 567–69.

38 *Snapp*, 458 U.S. at 601.

39 See *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (permitting a state government intervenor to appeal a judgment invalidating a state law because “a State clearly has a legitimate interest in the continued enforceability of its own statutes”); see also Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other than Global Warming*, 102 Nw. U. L. REV. COLLOQUY 1, 7 (2007) (noting that “the state . . . has a sovereign interest in preserving its own law” that “should be sufficient for Article III purposes”).

40 One important qualification is that the injury must still be “imminent.” Any aspiring plaintiff must still show that she is being constrained from doing something that she is

prohibited recreational marijuana use, for example, would have standing to challenge a federal statute purporting to legalize such use because that statute would constrain the state from enforcing a law that it was otherwise lawfully entitled to enforce. This interest is not fundamentally different from a private employer's interest in defending a policy of not hiring persons using marijuana by challenging a state law prohibiting that practice.<sup>41</sup>

Even a state's "quasi-sovereign" interest in redressing injuries to its citizens is not intrinsically different from interests frequently and uncontroversially asserted by private parties. As my colleague, Katherine Mims Crocker, points out in this Symposium,<sup>42</sup> states asserting such claims are closely analogous to private associations that bring suit on behalf of their members. If the Sierra Club may establish organizational standing based on its members' interests in enjoying the environment,<sup>43</sup> then surely California may assert the similar interests of *its* members—that is, its citizens. As I discuss further below,<sup>44</sup> the question is not simply whether states should be able to sue on behalf of their citizens, but rather how state suits compare to other likely vehicles for aggregating diffuse claims.

Nothing I have said here would meaningfully expand the law of standing. But that law as it bears on state litigants has become bogged down in distinctions between sovereign, quasi-sovereign, and proprietary interests. These terms may well be helpful in describing the different sorts of interests that state governments often assert. But these categories may overlap in important ways, and they are not fundamentally different from the sorts of interests that support suits by private actors. In most situations, we should treat state governments as no different in principle from private litigants. Because they are states, of course, state litigants engage in a broader range of activities than most plaintiffs. But as I discuss in Part II below, the burden should be on opponents of state standing to explain why those differences are relevant to the basic principles of Article III.

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actually likely to do. Your fundamentally sedentary author would likely lack standing to challenge a government prohibition on running marathons. One might alternately state this limit as a function of ripeness: one lacks standing to challenge a law until one is actually—or imminently will be—affected by its requirements. See, e.g., *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947). Hence, a state that had enacted no laws governing, say, data privacy might find itself unable to challenge a federal law preempting that field, at least until it could show that the federal law was preventing a live legislative proposal from being enacted.

41 See, e.g., MINN. STAT. ANN. § 152.32(3)(c) (West 2018) (prohibiting employers from discriminating against medical marijuana users).

42 Katherine Mims Crocker, *An Organizational Account of State Standing*, 94 NOTRE DAME L. REV. 2057 (2019) [hereinafter Crocker, *Organizational Account*]; see also Lemos & Young, *supra* note 16, at 111–12.

43 See *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). The trouble in *Morton* was that the Sierra Club had alleged no individualized harms to its members. But states' *parens patriae* claims typically *do* allege such harms. See, e.g., *Snapp*, 458 U.S. at 609 (recognizing Puerto Rico's right to sue *parens patriae* to redress employment discrimination against its residents).

44 See *infra* Section II.C.

B. *Cooperative Federalism and States' Interest in Separation of Powers*

Some critics have suggested that states should have standing to assert only limited classes of interests and arguments uniquely related to their status in our federal system. Professor Tara Grove, for example, has argued that “[s]tates have broad standing to protect *federalism* principles, not the constitutional separation of powers.”<sup>45</sup> This Section offers two related answers to that way of thinking. First, because of changes to the structure of American federalism over the last century, changes in federal law pervasively affect state governments, which frequently act as partners with federal officials in implementing federal regulatory and benefit schemes. Because of this, one generally need not rely on special or broad notions of state standing to find states have an interest in challenging unlawful changes to federal policy. Second, constitutional categories like federalism, separation of powers, or individual rights are not so readily separated—and they should not be artificially walled off for standing analysis. States frequently have significant interests at stake in separation of powers cases, for example.<sup>46</sup> It is thus not only artificial but corrosive of the constitutional scheme to limit states to litigating particular categories of claims.

*Snapp* recognized “a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.”<sup>47</sup> This is not simply an interest in being denied, say, sovereign rights protected by the “equal footing” doctrine. Rather, it includes “securing observance of the terms under which [the state] participates in the federal system.”<sup>48</sup> Those terms, however, have changed considerably since the Founding. Under the “dual federalism” model that dominated American law and governance for much of our history, the national and state governments operated largely in separate and exclusive spheres of authority.<sup>49</sup> The national government handled foreign affairs, for example, while the states (and their political subdivisions) governed family law and education. In such a regime, one would not expect either level of government to have much interest in the measures of the other.

After the New Deal, however, the old dual federalism regime of separate state and federal spheres gave way to cooperative federalism structures, in which state governments pervasively participate in the implementation of

45 Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 855 (2016).

46 See, e.g., Ernest A. Young, *Federalism as a Check on Executive Authority: State Public Litigation, Executive Authority, and Political Polarization*, 22 TEX. REV. L. & POL. 305 (2017–2018).

47 *Snapp*, 458 U.S. at 607.

48 *Id.* at 607–08.

49 See, e.g., Alpheus Thomas Mason, *The Role of the Court*, in *FEDERALISM: INFINITE VARIETY IN THEORY AND PRACTICE* 8, 24–25 (Valerie Earle ed., 1968); see also ANTHONY J. BELLIA JR., *FEDERALISM* 183 (2011) (“The *dual federalism* paradigm understands federal and state governments to operate in different spheres of authority.”); Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950).

federal law.<sup>50</sup> Under the Clean Air Act, for example, Congress establishes the basic parameters for air pollution regulation, but it delegates authority to the EPA to identify dangerous pollutants and establish acceptable levels. It also delegates authority to states, however, to develop and enforce implementation plans to achieve those federally mandated levels of pollution.<sup>51</sup> This sort of arrangement appears over and over again across the broad sweep of federal regulatory and benefit programs. At the same time that broad constructions of Congress's enumerated powers eliminated the states' exclusive authority over their old sphere, then, the states gained a key role in the administration of federal programs.<sup>52</sup>

Under cooperative federalism, state officials are intimately and pervasively involved in federal policy. As Professor Heather Gerken has explained, "[t]he policymaking space in which [state officials] wield power is not [a] separate regulatory carve-out . . . . Instead, state policymakers wield power in the nooks and crannies of the [federal] administrative system."<sup>53</sup> This relationship creates "concrete governance interests that flow from this modern-day shared sovereignty."<sup>54</sup> When federal policy shifts, state officials will often have to alter their own policies and practices in response. Sometimes, as with Massachusetts and the contraceptive mandate, federal policy changes will effectively shift costs to state governments. In other situations, state officials may bear the brunt of political backlash against the new federal approach. Or the federal policy shift may simply create additional work for state officials. In each of these situations, the burden falling on the states is comparable to injuries held sufficient to create standing for private entities.<sup>55</sup>

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50 See, e.g., Morton Grodzins, *Centralization and Decentralization in the American Federal System*, in *A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM* 1, 1–2 (Robert A. Goldwin ed., 1961); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001).

51 See generally John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183 (1995).

52 See, e.g., Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, in *NOMOS LV: FEDERALISM AND SUBSIDIARITY* 34, 44–46, 53–57 (James E. Fleming & Jacob T. Levy eds., 2014).

53 Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1557 (2012) (footnote omitted).

54 Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 642 (2016). Professors Woolhandler and Collins urge that "[a] party who implements regulations . . . is not generally thought of as a proper plaintiff to challenge policies for implementing the law," but they cite only cases holding that *federal* officials cannot challenge *federal* policy. Woolhandler & Collins, *Reining*, *supra* note 5, at 2025 n.55. A central point of the cooperative federalism literature is that state implementation is different because state officials do not work for the federal government. See Gerken, *supra* note 53, at 1560; Ernest Young, *Federalism as a Constitutional Principle*, 83 U. CIN. L. REV. 1057, 1075 (2015). See generally JOHN D. NUGENT, *SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING* 168–212 (2009).

55 See, e.g., Havens Realty Corp. v. Coleman, 455 U.S. 363, 378 (1982); see also Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 154–55 (2010) (finding adequate injury in

Not all areas are governed by cooperative federalism regimes, of course. Immigration, for example, has long been thought to be a national concern,<sup>56</sup> and state governments generally are not tasked with implementing federal immigration policy in the same way that they implement, say, the Clean Air Act.<sup>57</sup> But state and local governments nonetheless share responsibility for dealing with immigrants in myriad ways; once immigrants arrive, states and localities must police them, educate their children, and determine their eligibility for government benefits like driver's licenses, in-state college tuition, and welfare benefits. Moreover, state regulation affects the attractiveness of immigration indirectly yet powerfully by, for example, controlling immigrants' access to employment and public benefits.<sup>58</sup>

Likewise, federal and state criminal law are nominally administered by separate and independent enforcement agencies. But as a practical matter these agencies are highly integrated, with federal, state, and local law enforcement agents cooperating on joint investigations and task forces; state and local prosecutors referring cases to federal prosecutors; and state criminal convictions serving as a critical ingredient in federal sentencing decisions.<sup>59</sup> In certain areas, such as marijuana enforcement, the dependence of federal legal regimes upon state cooperative enforcement has become all too evident as states decide no longer to pursue parallel objectives.<sup>60</sup> These examples demonstrate that even outside of classic cooperative federalism

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farmers' need to take costly precautions to protect their crops from genetically modified alfalfa planted by neighboring farm); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) (holding that plaintiffs' inability to obtain information about donors supporting their political opponents was sufficient injury for standing).

56 See, e.g., *De Canas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."). But see Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 575–80 (2008) (arguing that this "[c]onventional [w]isdom" is incorrect).

57 Section 287(g) of the Immigration and Nationality Act does authorize states and localities to enter into agreements with federal officials delegating certain kinds of enforcement authority. See 8 U.S.C. § 1357(g); Rodríguez, *supra* note 56, at 591. That program has had very mixed results. Currently, the U.S. Immigration and Customs Enforcement website reports "agreements with 78 law enforcement agencies in 20 states." *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/287g> (last updated Aug. 10, 2018).

58 See, e.g., *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582 (2011) (holding that federal law did not preempt an Arizona statute penalizing businesses that hire undocumented aliens).

59 See, e.g., *Stokeling v. United States*, 139 S. Ct. 544 (2019) (examining when a state conviction qualifies to enhance federal penalties under the Armed Career Criminal Act); Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1159 (1995); Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 815–20 (2004).

60 See Ernest A. Young, *Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction*, 65 CASE W. RES. L. REV. 769, 782 (2015).

regimes, the operation of state law is frequently structured around, and crucially affected by, the operation of federal legal regimes.<sup>61</sup>

To the extent that the “terms under which [the state] participates in the federal system” emphasized in *Snapp* are now defined by cooperative federalism models,<sup>62</sup> legitimate state interests will be impacted, perhaps adversely, by changes in federal policy. For that reason, I disagree with Tara Grove’s insistence that “[s]tates do *not* have a special interest in the manner in which the federal executive enforces *federal law*.”<sup>63</sup> Where states partner with federal officials to enforce federal regulatory schemes, they will often have a unique interest in the legality of federal alterations to those schemes or actions taken pursuant to them. That interest is special in the sense that states have it precisely because of their governmental role as participants in federal regulation, but it is soundly analogous to the interest that one business partner has in the conduct of another.

Professor Grove suggests that the states’ standing should be limited to situations in which federal action bears on their capacity to exercise self-government.<sup>64</sup> “[I]t is hard to see,” she writes, “how States have a special interest—over and above that of private parties, localities, or even Congress itself—in the federal executive’s compliance with federal statutes.”<sup>65</sup> But the recent work of Heather Gerken, Jessica Bulman-Pozen, and others has demonstrated that one important way states exercise self-government within our contemporary legal landscape is through their participation in the implementation of federal law.<sup>66</sup>

To be sure, recognizing the states’ stake in federal regulation will give rise to cognizable injuries in a wide range of cases. In the Texas immigration case, for instance, the United States worried that, on this sort of theory, any state that incorporated the federal definition of taxable income into its own income tax scheme—which nearly every state with an income tax does—would have standing to challenge any change in federal tax policy that

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61 Cf. *Texas v. United States*, 809 F.3d 134, 163 (5th Cir. 2015) (holding that Texas fell within the zone of interests of the Immigration and Nationality Act because “Texas seeks to participate in notice and comment before the Secretary changes the immigration classification of millions of illegal aliens in a way that forces the state to the Hobson’s choice of spending millions of dollars to subsidize driver’s licenses or changing its statutes”), *aff’d per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

62 *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 608 (1982).

63 Grove, *supra* note 45, at 855.

64 *Id.*

65 *Id.*

66 See MORTON GRODZINS, *THE AMERICAN SYSTEM* 8 (Daniel J. Elazar ed., 1966); NUGENT, *supra* note 54, at 116–17; Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256, 1271–80 (2009) (describing states’ ability to exercise self-government within the context of implementing federal law); Gerken, *supra* note 53, at 1557 (“States do not rule separate and apart from the system . . . [T]hey serve as part of a complex amalgam of national, state, and local actors implementing federal policy.”); Larry Kramer, *Understanding Federalism*, 47 *VAND. L. REV.* 1485, 1542–46 (1994).

altered that definition and thereby lowered state tax receipts.<sup>67</sup> It is true that any such state would have a concrete injury in fact. But to say as much is hardly to say that states will have a meaningful right to block every change to federal tax policy.<sup>68</sup> They would need a viable cause of action to challenge such changes, plausible claims that the changes were illegal, and a good argument that the rights the changes were alleged to violate extended to states as well as to taxpayers. Not every unappealing category of lawsuit need be foreclosed at the standing stage; there are many other ways to weed out undesirable and nonmeritorious claims.

The end of dual federalism and the rise of cooperative models undermine arguments based on traditional limits on state litigation that were hashed out in a period when the states and the national government had a very different relationship.<sup>69</sup> State public-law litigation thus seems particularly appropriate to challenge unlawful federal action implicating the states' own participation in federal regulatory schemes. As Professor Shannon Roesler has noted, "[i]t makes little sense to look to early Supreme Court decisions analyzing federal-state conflicts regarding lawmaking authority in an age when states and local governments are intimately involved in the implementation and enforcement of federal law."<sup>70</sup> Because states no longer enjoy exclusive policy domains of their own, and because they are pervasively involved in implementing federal policy, states have important interests in participating in federal policy debates. That entails an interest in *how* federal law is made—in particular, in whether federal lawmaking respects legislative and administrative processes that afford states an opportunity for input. Put

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67 *Texas v. United States*, 809 F.3d 134, 161 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

68 And states probably *should* have standing to contest at least some changes to tax policy. I am not enamored by the various substantive claims that have been advanced to challenge recent changes to the deductibility of state taxes on taxpayers' federal returns, but I do expect states ought to have standing to challenge those changes. We will significantly distort standing doctrine if we give up on the merits as an important means of disposing of bad claims.

69 See Woolhandler & Collins, *Reining*, *supra* note 5, at 2028 (suggesting that because it is difficult to limit state standing under contemporary doctrine, "it may be necessary to resort to older versions of when states had litigable cases in the Article III courts"). Professors Woolhandler and Collins's best case is *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 77 (1867), which foreclosed Georgia from challenging the constitutionality of Reconstruction based on injuries to its "rights of sovereignty." That confusing opinion reads more like a political question than a standing case. See *id.* (observing that Georgia's claims "call for the judgment of the court upon political questions"); see also Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 88 [hereinafter Bickel, *Voting Rights*] (describing *Stanton* as "*sui generis*—a political question case"). And in any event, the Court's refusal to enjoin the Union Army from carrying out the Reconstruction Acts in the immediate aftermath of the Civil War hardly seems like an apt guide to whether a state should be able to challenge a change to workaday federal agency rules within the modern administrative state.

70 Roesler, *supra* note 54, at 641.

simply, states have legitimate interests in policing not only the constitutional and statutory rules of federalism but also those of separation of powers.

Most obviously, states participate in federal policy debates through their congressional representatives.<sup>71</sup> The Supreme Court's federalism jurisprudence has long acknowledged that "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself"—particularly the representation of the states in Congress.<sup>72</sup> The Court has given life to these "political safeguards" of federalism by insisting that Congress make the crucial decisions that affect important state interests.<sup>73</sup> Whether or not these political safeguards are sufficient to obviate the need for judicial enforcement of other constitutional limits on national authority, doctrines protecting Congress's role have been critical to sustaining our federal structure.<sup>74</sup>

It is thus crucial that states have standing to complain when the Executive cuts Congress—and therefore states' representation in that body—out of the loop. Such claims have become common in recent years, as political polarization tends to lead to legislative gridlock, encouraging both Republican and Democratic Presidents to press their goals through unilateral action.<sup>75</sup> Separation of powers claims, like Texas's in the immigration case—that the President violated the Take Care Clause by acting unilaterally without congressional authorization—are thus particularly appropriate for states to assert.<sup>76</sup> The United States cannot plausibly argue that disputes over federal policy should be deferred to political resolution when the national Executive has circumvented that very political process in which states would otherwise have been represented.

States' legitimate separation of powers concerns are not limited to national actions lacking statutory authorization altogether. Congress has delegated significant authority to executive agencies, and the primary check on executive action pursuant to such delegations is judicial review that assesses

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71 See THE FEDERALIST NO. 45, at 311–12 (James Madison) (Jacob E. Cooke ed., 1961); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954).

72 *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985); see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824) (acknowledging the national government's broad enumerated powers and suggesting that within their bounds, "[t]he wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints" (emphasis added)).

73 See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) ("[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise."); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1325 (2001).

74 See, e.g., Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1350–52 (2001).

75 See Lemos & Young, *supra* note 16, at 62–63.

76 See Brief of Federal Courts Scholars, *supra* note \*, at 29–31.



the consistency of agency action with congressional command.<sup>77</sup> Hence, it is critical that states remain able to assert precisely the sort of statutory claim that—to take just one example—Massachusetts asserted in the contraceptive mandate case: that the agency has exceeded the scope of its mandate under the law that Congress wrote.<sup>78</sup> Without this safeguard, states would be critically “excluded from the benefits that are to flow from participation in the federal system.”<sup>79</sup>

Substantive review under the APA, however, is an incomplete protection for states in contemporary American policymaking. Given the broad terms of modern federal statutes, the most important “legislative” battles involve the sorts of rulemaking proceedings at issue in the Massachusetts contraception case. The APA’s notice-and-comment requirement—as well as the opportunity to sue when that right is denied—affords state governments their own independent voice in federal policymaking analogous to their constitutionally mandated representation in national legislation. As Daniel Francis has observed:

[I]ndependence of voice may be particularly useful when the levels of government exhibit significant *interdependence of action*. In modern America, state institutions and officials are deeply enmeshed in federal programs: state officials administer federal programs, enforce federal law, and interpret federal norms, formally subject in all cases to federal decisionmakers.<sup>80</sup>

Given the cooperative structure of most federal regulatory programs, it would be difficult to identify any class of entities more pervasively enmeshed in and affected by changes in federal regulations than state governments. States must have a voice in that process *before* rules become finalized. It is thus no surprise that so many lawsuits brought by state governments challenging federal action involve notice-and-comment claims under the APA.

The world in which states and state interests could stand apart from the workings of the national government died, if it ever existed, at the New Deal. The post–dual federalism world, with its concurrent regulatory jurisdiction and cooperative regulatory structure, poses daunting challenges for state

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77 See, e.g., CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 143 (1990) (“Broad delegations of power to regulatory agencies, questionable in light of the grant of legislative power to Congress in Article I of the Constitution, have been allowed largely on the assumption that courts would be available to ensure agency fidelity to whatever statutory directives have been issued.”); Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2130–41 (2008) (arguing that agency action is legitimate only to the extent it can be grounded in congressional mandates).

78 See generally Comment, *State Standing to Challenge Federal Administrative Action: A Re-Examination of the Parens Patriae Doctrine*, 125 U. PA. L. REV. 1069, 1094–1103 (1977).

79 Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 608 (1982).

80 Daniel Francis, *Litigation as a Political Safeguard of Federalism*, 49 ARIZ. ST. L.J. 1023, 1050 (2017); see also Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 537 (2011) (“[E]very branch of state government is squarely in the midst of creating, implementing, and interpreting federal statutory law.”).

autonomy, but its governing structures of legislative representation, bureaucratic cooperation, and access to agency deliberations provide opportunities for states to exercise continuing influence. States have a unique and legitimate stake in judicial action reviewing the legality of national action within this modern framework.<sup>81</sup>

## II. SHOULD STATES FACE UNIQUE IMPEDIMENTS TO STANDING?

Broad assertions of state standing to challenge national policy have been met with considerable skepticism. Not surprisingly, the U.S. Department of Justice has hardly embraced the notion, instead advancing a number of novel arguments against state standing to sue. The considerable pushback in the academy is somewhat harder to explain, especially given the earlier standing literature's tendency to criticize restriction on standing. State public-law suits challenging national policy became especially salient during the Obama administration, when "red" states challenged the Affordable Care Act, the Clean Power Plan, and the DAPA policy on immigration, and it is possible that the academy's general approval of those policies drove its skepticism of the lawsuits challenging them. The political valence of state litigation has evened out very quickly, however, with prominent state lawsuits challenging a wide variety of Trump administration policies.<sup>82</sup>

The United States has opposed state standing in suits challenging national policy by developing doctrinal arguments that, while stated in general terms, are practically speaking unique to state plaintiffs. The Justice Department has argued, for example, that when a state's costs arise from the interaction of the challenged federal action with some aspect of extant state law, the state's injury is "self-inflicted."<sup>83</sup> It has also contended that because the challenged federal programs will benefit the state in some way, the state lacks standing if those benefits exceed the costs to the state.<sup>84</sup> Finally, the Justice Department sometimes argues that state governments fall outside the zone of interests of the laws under which they challenge federal action—in particular, the APA.<sup>85</sup>

It is hard to take these arguments at face value because they would radically eliminate standing for private litigants in very traditional sorts of cases if applied to litigants across the board. The subtext of the doctrinal arguments is thus a claim of constitutional policy, if you will—that is, that state governmental challenges to national policy are generally inappropriate, and that the doctrine must be manipulated to prevent them. The reason given is gen-

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81 See, e.g., Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051, 2100 (2011) ("[S]overeign state standing provides an important means by which states can claim their rightful position in the American constitutional scheme.").

82 See, e.g., Lemos & Young, *supra* note 16, at 85–95 (discussing the relationship between partisan polarization and state litigation).

83 See *infra* Section II.A.

84 See *infra* Section II.B.

85 Brief for the Petitioners at 33–36, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674).

erally that state challenges to federal policy raise inherently “political” issues that should be worked out in the political process rather than in court. In this, the arguments asserted by lawyers for the United States echo the concerns expressed by many academics.<sup>86</sup>

This Section surveys both the particular doctrinal objections to state governmental standing and the more general concern that state litigation is inherently political. My discussion presupposes that standing doctrine is its own set of rules that aspire to internal coherence. Even if one were convinced that state governmental challenges to national policy were pernicious in their impact on the body politic, one should hesitate to pour out such cases on grounds that cannot be defended as principled in general terms.<sup>87</sup>

### A. *Self-Inflicted Injury*

In the Texas immigration litigation, the Justice Department argued that Texas’s costs incurred processing DAPA beneficiaries’ driver’s license applications were self-inflicted because it was Texas’s own law that enabled all persons legally present in the state to make such an application.<sup>88</sup> The Department of Justice made a similar argument in the Massachusetts contraceptive mandate litigation.<sup>89</sup> The lower courts rejected this argument in the Texas case and have so far not relied upon it in the Massachusetts litigation.<sup>90</sup> But the self-inflicted injury argument aptly captures the Justice

86 This concern has been around for a long time. See, e.g., Bickel, *Voting Rights*, *supra* note 69, at 89–90. And it is no coincidence that Professor Bickel argued for special restrictions on state standing at roughly the same time that he contended more generally that courts should manipulate justiciability doctrines to avoid deciding controversial cases. See Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40 (1961).

87 See, e.g., Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

88 See Brief for the Petitioners, *supra* note 85, at 24–29. One reason not to take the Justice Department’s argument on this point too seriously is that, at roughly the same time, it had persuaded the Ninth Circuit that the federal immigration laws *preempted* any restrictions that a state might choose to impose on eligibility for driver’s licenses. See United States’ Brief as Amicus Curiae in Support of Appellees at 8, *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) (No. 15-15307) (arguing that because federal power over immigration is exclusive, “a State generally may not establish classifications that distinguish among aliens whom the federal government has treated similarly”); see also *Ariz. Dream Act Coal.*, 757 F.3d at 1063–65 (holding that both the Equal Protection Clause and federal preemption precluded Arizona from “target[ing] DACA recipients for disparate treatment”).

89 See Memorandum in Support of Defendants’ Cross-Motion to Dismiss or for Summary Judgment and in Opposition to Plaintiff’s Motion for Summary Judgment at 12–13, *Massachusetts v. U.S. Dep’t Health & Human Servs.*, 301 F. Supp. 3d 248 (D. Mass. 2018) (No. 17-11930).

90 See *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 301 F. Supp. 3d 248 (D. Mass. 2018), *vacated*, 923 F.3d 209 (1st Cir. 2019); *Texas v. United States*, 86 F. Supp. 3d 591, 619 (S.D. Tex.), *aff’d*, 787 F.3d 733 (5th Cir. 2015), *aff’d per curiam by an equally divided court*, 136 S. Ct. 2271 (2016). Judge Kleinfeld of the Ninth Circuit, however, did rely exclu-

Department's considered disregard of the way its policies interact with state law. The notion that states should have to alter their own laws in order to avoid deleterious impacts of federal policy, even if those federal policies are unlawful, seems uniquely designed to disrupt the structure of contemporary cooperative federalism arrangements. For that reason, it is worth considering the argument at some length.

The closest the Supreme Court has come to recognizing a doctrine of self-inflicted injury was in *Clapper v. Amnesty International USA*,<sup>91</sup> which held, inter alia, that the costs a plaintiff may incur to avoid the impact of a federal policy may not themselves constitute the sort of injury in fact needed to challenge that policy.<sup>92</sup> The *Clapper* plaintiffs challenged aspects of the Foreign Intelligence Surveillance Act (FISA) that authorized surveillance of certain individuals outside the United States.<sup>93</sup> The plaintiffs—who claimed to engage in communications with persons subject to FISA surveillance—could not demonstrate that they had, in fact, been subjected to any FISA surveillance; instead, they relied on the costs they had incurred to avoid the possibility of such surveillance to establish their injury.<sup>94</sup> Because these costs arose from the plaintiffs' concerns that they *might* be subjected to surveillance, the Court held that "respondents' self-inflicted injuries are not fairly traceable to the Government's purported activities . . . and their subjective fear of surveillance does not give rise to standing."<sup>95</sup>

*Clapper* holds, at most, that plaintiffs who cannot show they are even subject to a government policy cannot manufacture injury in fact by voluntarily expending resources in anticipation of being subject to that policy. That is a problem when one is challenging a secret surveillance program, but it will not fit the vast majority of state lawsuits against national policy. In the immigration case, for instance, the United States did not dispute that DAPA would apply to persons in Texas and, as a result, affect the operation of Texas's own governmental operations.<sup>96</sup> *Clapper*, moreover, must be read in conjunction with other cases recognizing standing based on injuries that might also be characterized as self-inflicted. In *Monsanto Co. v. Geertson Seed Farms*,<sup>97</sup> for example, the Court held that conventional alfalfa farmers had standing to challenge a federal agency's decision to deregulate genetically engineered alfalfa.<sup>98</sup> Although it was uncertain whether the genetically engineered alfalfa would in fact infect nearby conventional alfalfa farms, the

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sively upon this argument to urge that California lacked standing to challenge the new contraceptive mandate rules. See *California v. Azar*, 911 F.3d 558, 585–88 (9th Cir. 2018) (Kleinfeld, J., dissenting).

91 568 U.S. 398 (2013).

92 See *id.* at 415–18, 422.

93 *Id.* at 401.

94 See *id.* at 407.

95 *Id.* at 418.

96 See *Texas v. United States*, 86 F. Supp. 3d 591, 616–22 (S.D. Tex.), *aff'd*, 787 F.3d 733 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

97 561 U.S. 139 (2010).

98 See *id.*

plaintiffs undertook costly precautions against such infection.<sup>99</sup> The Court concluded that “[s]uch harms, which respondents will suffer even if their crops are not actually infected with the Roundup Ready gene, are sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis.”<sup>100</sup> If there were a general rule against self-inflicted injuries, then surely *Monsanto* would have come out the other way.<sup>101</sup>

Understandably, the United States has not relied primarily on *Clapper* (and generally does not mention *Monsanto*). Instead, its best case is *Pennsylvania v. New Jersey*.<sup>102</sup> That case considered two separate motions for leave to file complaints in this Court’s original jurisdiction concerning taxation by one state that allegedly injured other states.<sup>103</sup> The entirety of the relevant discussion in the Court’s opinion is as follows:

In neither of the suits at bar has the defendant State inflicted any injury upon the plaintiff States through the imposition of the taxes held, in No. 69, and alleged, in No. 68, to be unconstitutional. The injuries to the plaintiffs’ fiscs were self-inflicted, resulting from decisions by their respective state legislatures. Nothing required Maine, Massachusetts, and Vermont to extend a tax credit to their residents for income taxes paid to New Hampshire, and nothing prevents Pennsylvania from withdrawing that credit for taxes paid to New Jersey. No State can be heard to complain about damage inflicted by its own hand.<sup>104</sup>

This cursory discussion is the rock upon which the United States has rested its self-inflicted injury argument, but *Pennsylvania* cannot bear the weight. The case did not concern Article III standing at all, but rather the Supreme Court’s standard for exercising its original jurisdiction.<sup>105</sup> In *Mississippi v. Louisiana*,<sup>106</sup> the Court explained that

[r]ecognizing the “delicate and grave” character of our original jurisdiction, we have interpreted the Constitution and 28 U.S.C. § 1251(a) as making our

99 See *id.* at 154–55.

100 *Id.* at 155.

101 *Clapper* distinguished *Monsanto* on the ground that the Farmers presented “concrete evidence to substantiate their fears,” as opposed to “mere conjecture about possible governmental actions.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 420 (2013). This confirms that the problem in *Clapper* was rooted in the uncertainty that the challenged government action would ever apply to the plaintiffs, thus rendering their precautionary expenditures not only self-inflicted but superfluous. In any event, given the evidentiary record and the district court findings here, the present case is much closer to *Monsanto* than *Clapper*.

102 426 U.S. 660 (1976) (per curiam); see also, e.g., Brief for the Petitioners, *supra* note 85, at 25 (“*Pennsylvania* controls.”).

103 See *Pennsylvania*, 462 U.S. at 661.

104 *Id.* at 664.

105 For one thing, the only use of the term “standing” in the opinion occurs in the Court’s later discussion of Pennsylvania’s additional *parens patriae* claim on behalf of its citizens. *Id.* at 660. The Court rejected that claim based on other grounds having nothing to do with self-inflicted injury, and the United States has not relied on that part of the opinion. See Brief for the Petitioners, *supra* note 85.

106 506 U.S. 73 (1992).

original jurisdiction “obligatory only in appropriate cases,” and as providing us “with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court.”<sup>107</sup>

One criterion for the exercise of jurisdiction is that “it must appear that the complaining State has suffered a wrong through the action of the other State,”<sup>108</sup> and it is evidently this requirement that concerned the Court in *Pennsylvania*. Certainly there is conceptual overlap between this requirement and Article III injury in fact, but the original jurisdiction cases do not invoke Article III and there is no reason to believe that the standards are the same.<sup>109</sup> As the Wright and Miller treatise puts it, “[t]he special concerns that have guided the Court in this area [original jurisdiction] are unique to its own jurisdictional problems, and do not provide a sure basis for analogous reasoning in other areas of state standing.”<sup>110</sup>

In any event, the novel requirement proposed by the United States would have radical implications for standing doctrine. The United States has suggested that an injury is self-inflicted, and therefore unable to support standing, any time it could have been avoided if the plaintiff had taken some further action. That principle would have eliminated standing in any number of landmark decisions. Oliver Brown, the lead plaintiff in *Brown v. Board of Education*,<sup>111</sup> could have avoided the injury of segregation by homeschooling his daughter. Jane Roe<sup>112</sup> could have gone to a state where abortion was legal, or simply not gotten pregnant in the first place. No one thinks these are good arguments against the standing of the plaintiffs in those cases. Because the laws in question were unconstitutional, the plaintiffs were not required to alter their affairs in order to avoid them. But that then raises the question why self-inflicted injury should be a good argument against *any* plaintiff—including a state.

The truth is that most injuries can be avoided by some action or other; the question is whether the plaintiff could have so easily avoided its injury

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107 *Id.* at 76 (citations omitted) (first quoting *Louisiana v. Texas*, 176 U. S. 1, 15 (1900); then quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972); and then quoting *Texas v. New Mexico*, 462 U.S. 554, 570 (1983)).

108 *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939).

109 The standard for whether the interest of the complaining state is sufficient to support the Supreme Court’s original jurisdiction is rather higher than the standard for Article III injury in fact. *See, e.g., Texas v. New Mexico*, 462 U.S. at 571 n.18 (“The model case for invocation of this Court’s original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign.”).

110 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3531.11.1 (3d ed. 2018); *see also California v. Azar*, 911 F.3d 558, 574 (9th Cir. 2018) (“We question whether the holding of *Pennsylvania* applies outside the specific requirements for the invocation of the Supreme Court’s original jurisdiction.”).

111 347 U.S. 483 (1954).

112 *See Roe v. Wade*, 410 U.S. 113 (1973).

that it lacks any real personal stake in the dispute.<sup>113</sup> Certainly the justiciability rules do not categorically require the states to take evasive action at all costs to avoid injury at the hands of federal law. When a state law has been held invalid on federal constitutional grounds, for example, the state has standing to appeal that judgment based on the injury that inheres in not being able to enforce its law;<sup>114</sup> no one says that this injury is self-inflicted because the state did not have to enact its law in the first place. States are not required to alter their legal regimes to accommodate changes in federal law that injured them without first having the opportunity to challenge the validity of that federal change.<sup>115</sup>

### B. *Offsetting Benefits*

A second genre of argument raised on occasion to contest state standing concerns offsetting benefits of the challenged federal policy that arguably cancel out the plaintiff state's injury. In the Texas immigration case, for instance, the Justice Department argued that immigration was good for the Texas economy and that this benefit would offset the expense to the state of processing DAPA beneficiaries' driver's license applications.<sup>116</sup> Like the self-inflicted injury argument, this is a genre of standing argument that one generally does not encounter in public-law litigation involving other sorts of plaintiffs. There are good reasons for that.

This sort of argument raises three problems. First, it will undermine efforts to preserve standing as a *threshold* issue in federal litigation. In *Gonzales v. Raich*, for example, persons using marijuana for medicinal purposes challenged Congress's power to regulate marijuana under the Commerce Clause.<sup>117</sup> If offsetting benefits were relevant to standing, the United States could have argued that marijuana is more detrimental than helpful to health and that, therefore, Angel Raich had no cognizable injury. But, of course, no one tried to make this argument. And if they had, the courts would have had to postpone resolution of the standing issue until trial, at which time evidence could have been presented to resolve disputes about the health effects of marijuana.

Or consider a hypothetical suit—similar to many actual cases—challenging an agency's failure to issue an environmental impact statement prior to

113 See, e.g., *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (observing that “the standing question is whether the plaintiff has ‘alleged . . . a personal stake in the outcome of the controversy’” (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))).

114 See *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (permitting a state government intervenor to appeal a judgment invalidating a state law because “a State clearly has a legitimate interest in the continued enforceability of its own statutes”).

115 See, e.g., *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) (recognizing a state's “sovereign interest[ ]” in “the power to create and enforce a legal code”).

116 See *Texas v. United States*, 809 F.3d 134, 155–56 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

117 *Gonzales v. Raich*, 545 U.S. 1 (2005).

building a dam or a highway. Such a failure would ordinarily be challenged by persons whose property interests are harmed by the project, and the government does not ordinarily argue—for standing purposes—that the economic benefits of the project outweigh those injuries. In cases where the plaintiffs' claims turned on the reasonableness of the government action or the elimination of the relevant property rights, an effort to assess offsetting benefits would frequently overlap substantially with the claims on the merits. Certainly an offsetting benefits inquiry would make it nearly impossible to resolve standing at the motion to dismiss or summary judgment stage, as that sort of argument will nearly always implicate factual disputes.

Second, often claims of offsetting benefits will require courts to resolve conflicts between incommensurable values. Part of the harm in this case, for example, is that changes to immigration laws that the plaintiff states support have been made through a unilateral executive action that circumvented the states' representation in Congress. Does the possibility that the plaintiff states might save some money on net outweigh the infringement of the constitutional and democratic principles they assert? Likewise, nature lovers challenging the construction of a road through a pristine forest might be unpersuaded that the offsetting benefits of the road outweigh any injury to their aesthetic preferences. It is unclear how a court would even begin to make these sorts of assessments.

Finally, any sort of "offset" argument is particularly inappropriate with respect to a claim by a state government. Whether the benefits of increased immigration are likely to outweigh the costs, for example, is a policy judgment, and the duly elected policy organs of the twenty-six States who challenged the DAPA policy had made the judgment they do not.<sup>118</sup> This is exactly the sort of judgment that—in other contexts—receives nearly conclusive deference.<sup>119</sup> Preventing state governments from acting on their judgment is itself a legal injury, and that constraint can be sustained only if the challenged national government turns out to be valid on the merits. There is no warrant in standing doctrine, however, for second-guessing the states' policy judgments at the threshold.

### *C. Politics and the Public Interest*

These arguments against states' standing are so unpersuasive on their own merits that, to get even the limited traction they have gotten in state public litigation, they must be driven by some more deep-seated anxiety about state litigation. Similarly, much of the academic commentary seems to

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118 Whether the initial judgment to join the suit is made by a state legislature, governor, or attorney general is irrelevant, given that state legislatures have means to control state litigation decisions and state executive officials are electorally accountable in their own right.

119 *Cf. LeClerc v. Webb*, 419 F.3d 405, 421 (5th Cir. 2005) ("Under traditional rational basis analysis . . . [t]he key principle is the deference to legislative policy decisions embodied in courts' reluctance to judge the wisdom, fairness, logic or desirability of those choices.").



start with the conclusion that we don't like states as litigants, then reason backward to doctrines that might exclude them.<sup>120</sup> The underlying anxiety seems to be twofold. The first concern seems to be that the states are inappropriately usurping the role of protecting the public interest in areas like immigration, environmental policy, or healthcare where national law is now primary. That role, critics suggest, belongs to the national government.<sup>121</sup> The second, not unrelated concern is that state public lawsuits like the Texas immigration litigation or the "blue" state challenges to the Trump administration's travel bans raise highly politicized issues that should be resolved outside of court.

These concerns are worth taking seriously, but they are ultimately unpersuasive. Take the public interest first. The American Constitution divides sovereignty between two levels of government; as Justice Kennedy famously said, the American Founders "split the atom of sovereignty."<sup>122</sup> Although Americans have debated the true meaning of that division for over two centuries, one strong implication is that no particular unit of government can claim a monopoly on the public interest. The national government speaks for that interest when it exercises its constitutional functions, but it is equally clear that state governments also speak for the public interest when exercising *their* constitutional functions.

One might accept this much and still insist that responsibility for the public interest is strictly divided between the national and state governments. That, for instance, seems to be the assumption underlying the Court's decision in *Massachusetts v. Mellon*.<sup>123</sup> That case rejected Massachusetts's standing to sue *parens patriae*—that is, on behalf of its citizens—to challenge the operation of a federal statute. The Court said that

it is no part of [Massachusetts's] duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not the latter, they must look for such protective measures as flow from that status.<sup>124</sup>

This language certainly seems to suggest that the national government must determine the public interest where national law is concerned. As Professor Alexander Bickel put it, "the national government is fully in privity with the people it governs, and needs, and should brook, no intermediaries."<sup>125</sup>

And yet our contemporary federalism defies that simple division of labor. The Court decided *Mellon* in the heyday of dual federalism, just five

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120 See, e.g., Woolhandler & Collins, *Reining*, *supra* note 5, at 2015–16.

121 See, e.g., Bickel, *Voting Rights*, *supra* note 69, at 89.

122 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

123 262 U.S. 447 (1923).

124 *Id.* at 485–86.

125 See also Bickel, *Voting Rights*, *supra* note 69, at 89.

years after *Hammer v. Dagenhart*<sup>126</sup> and a decade and a half before the 1937 “switch in time” that ushered in an age of concurrent federal and state regulatory responsibilities. As I have already discussed, the state and national governments now share jurisdiction over the same policy space, and their efforts are frequently combined into integrated cooperative federalism schemes like the Clean Air Act. To appropriate Professor Bickel’s language, the modern national government “needs, and [must] brook, [lots of] intermediaries.”<sup>127</sup>

To be sure, our system generally provides that federal authorities have the last word within this realm, but only so far as they are acting within their legal authority. What the New Deal revolution certainly ended is the notion of two parallel spheres of state and national regulation, with two parallel conceptions of the public interest. We have in this sense come full circle to the Federalists’ conception of federalism, in which the two levels’ shared responsibility for the public interest allows Americans to turn to one level of government when the other overreaches.<sup>128</sup>

In any event, it is hard to see how this aspect of *Mellon* can survive the Court’s decision in *Massachusetts v. EPA*.<sup>129</sup> There, the Court upheld the States’ standing to sue the EPA for failing to carry out its responsibilities under the Clean Air Act.<sup>130</sup> If federal authorities had a monopoly of the public interest as embodied in that national act, then the States should not have been allowed to pursue that claim. But of course the States *were* allowed to pursue that claim. As Justice Stevens explained for the majority, “there is a critical difference between allowing a State ‘to protect her citizens from the operation of federal statutes’ (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do).”<sup>131</sup> So long as they can meet the traditional criteria for standing, states may sue to vindicate the public interest as they see it, even when in conflict with the views of federal officials and even when their claims rest on federal law.

One might still worry, of course, that state public litigation will draw the courts into highly politicized controversies that they would better avoid. That is a core criticism advanced by Professor Dellinger,<sup>132</sup> Grove,<sup>133</sup> Woolhan-

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126 247 U.S. 251 (1918) (striking down a federal child labor law on the ground that it regulated intrastate activity and thus fell outside Congress’s enumerated purview), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941).

127 See text accompanying note 125.

128 See THE FEDERALIST NO. 28, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“Power being almost always the rival of power; the General Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the General Government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other, as the instrument of redress.”).

129 549 U.S. 497 (2007).

130 *Id.* at 526.

131 *Id.* at 520 n.17 (quoting *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 447 (1945)).

132 See Dellinger Brief, *supra* note 7, at 3–4.

133 See Grove, *supra* note 45, at 855–56.

dler, and Collins, for example.<sup>134</sup> I do not wish to be read as taking this critique lightly. In other work, Professor Margaret Lemos and I have worried that the proliferation of state challenges to federal action under zealous state attorneys general, like Texas's Gregg Abbott or Massachusetts's Maura Healey, might ultimately undermine the usefulness and legitimacy of such litigation.<sup>135</sup> But these concerns about the politicization of state litigation must be evaluated in a broader context. State litigation is one avenue for resolving current disputes that combine a political and a legal dimension. We should not imagine that, if that avenue is closed off, the underlying disputes will simply go away. The crucial question is how state litigation compares with other likely avenues for resolving such disputes. In particular, we should ask how state litigation compares to public litigation brought by *nonstate* actors, and how state litigation compares to the remedies that political actors may be expected to employ *outside* the courts. In many circumstances, state litigation will be preferable to both these alternatives.

Take other forms of public litigation first. Professors Woolhandler and Collins want to return states “to their traditional disfavored status as plain-tiffs” by “resort[ing] to older versions of when states had litigable cases in the Article III courts.”<sup>136</sup> Those rules adhered closely to a “private rights” model of adjudication that restricted the exercise of judicial power to circumstances that resembled, as closely as possible, traditional common-law suits between private individuals.<sup>137</sup> Much of the criticism of state standing seems grounded in this model.<sup>138</sup> But as public-law scholars have long noted, the private rights model began to give ground to a “public rights”—or “law declaration”—model of litigation by the middle of the twentieth century.<sup>139</sup> That

134 See Woolhandler & Collins, *Reining*, *supra* note 5, at 2029–30; see also Bickel, *Voting Rights*, *supra* note 69, at 89–90.

135 See Lemos & Young, *supra* note 16, at 119–23.

136 Woolhandler & Collins, *Reining*, *supra* note 5, at 2028; see also Bickel, *Voting Rights*, *supra* note 69, at 89–90.

137 See Woolhandler & Collins, *Reining*, *supra* note 5, at 2019. See generally HART & WECHSLER, *supra* note 9, at 73–74 (describing the “private right” or “dispute resolution” model of adjudication).

138 See, e.g., *Texas v. United States*, 809 F.3d 134, 194–95 (5th Cir. 2015) (King, J., dissenting) (worrying that by hearing state claims against the federal government, courts were becoming “ombudsmen of the administrative bureaucracy” (quoting John G. Roberts, Jr., Comment, *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1232 (1993))), *aff’d per curiam* by an equally divided court, 136 S. Ct. 2271 (2016).

139 See HART & WECHSLER, *supra* note 9, at 74–75; Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976). It would be a mistake, however, to suppose that because much state litigation fits a broad “public rights” model of adjudication, there is an “absence of individual rights at stake.” Woolhandler & Collins, *Reining*, *supra* note 5, at 2030. Many of these cases implicate interests of great importance to individuals, such as the right against discrimination in the travel ban cases or, in the contraceptive mandate cases, access to contraceptives and exercise of religious conscience. And even when states litigate purely structural issues, the Supreme Court has made clear that structural principles “protect[ ] the liberty of the individual from arbitrary power.” *Bond v. United States*, 564 U.S. 211, 222 (2011).

model “presupposes that federal courts . . . have a special function of enforcing the rule of law, independent of the task of resolving concrete disputes over individual rights.”<sup>140</sup> I have considerable sympathy with criticisms that this model often overreaches the legitimate role of courts in the separation of powers,<sup>141</sup> but putting that genie back in the bottle would require far more radical reforms than limiting state standing. As Robert Kagan memorably observed, the use of adjudication to hammer out and implement public norms has become “the American way of law.”<sup>142</sup>

In our contemporary legal culture, barring states from litigating matters like the travel bans or environmental policy is hardly likely to keep the courts out of those controversies. Unless we also bar individuals and public interest organizations from litigating claims in those areas, the courts will be drawn in regardless. The question then becomes a comparative one: Are state governments better or worse litigants for such cases than the likely alternatives? Critics of state standing have rarely addressed this “Compared to what?” question.<sup>143</sup>

Professor Grove worries, for example, that state attorneys general will pursue the interests of their own states with “little incentive to be mindful of the national public interest in the enforcement (or non-enforcement) of federal law.”<sup>144</sup> But other possible public-law plaintiffs may have their own parochialisms. No one thinks the Sierra Club necessarily speaks for all persons concerned about the environment, or that the American Civil Liberties Union speaks for all interested in constitutional rights—much less that these sorts of advocacy groups speak for the entire “national public interest.” Our legal system has generally sought to transcend the potentially narrow perspectives of particular litigants by providing opportunities for other voices as intervenors and amici and by limiting the impact of individual judgments. In any event, as I discuss further in Part III, there are reasons to think state governments compare favorably to other public-law litigants.

The possibility remains, of course, that we should prefer “political” resolution of controversies over measures like the Obama immigration order or the Trump travel ban.<sup>145</sup> I have already noted that—in our litigation-saturated culture—the courts are likely to see these cases even if states do not bring them, and most proponents of political resolution do not deny that cases like the travel bans or the DAPA immigration order present justiciable legal questions for decision. It is a mistake to view political and legal disputes as mutually exclusive categories; in reality, they often overlap. But putting

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140 HART & WECHSLER, *supra* note 9, at 74.

141 See, e.g., SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 233 (2010).

142 ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

143 See Lemos & Young, *supra* note 16, at 105–23 (discussing this question in greater depth).

144 Grove, *supra* note 45, at 896.

145 See, e.g., Stephen I. Vladeck, *States’ Rights and State Standing*, 46 U. RICH. L. REV. 845, 871–74 (2012).

these reservations aside, I want to suggest that the virtues of purely political resolution for such controversies have been exaggerated.

Recent years have seen frequent disputes between the states and the national government and between the President and Congress. The contending sides in these disputes have often resorted to political remedies as an alternative litigation. These political remedies include shutting down the national government, refusing to raise the federal debt ceiling, congressional attempts to defund ongoing military operations, and refusals to confirm Executive officials or federal judges (or long delays in confirmation). Overuse of these remedies threatens to significantly impede the political system's ability to address current problems. The initial draft of this Essay went to the law review amidst the longest government shutdown in history as the President and Congress employed their political remedies in a battle over President Trump's border wall proposal.<sup>146</sup> My colleague Professor Neil Siegel has observed that "[i]n the United States today, the behavior of the political branches is generally viewed as more damaging to the American constitutional system than is the behavior of the federal courts."<sup>147</sup> A rational observer might well view the judiciary as—to paraphrase Hamilton—the least insane branch.<sup>148</sup>

None of this is to say that current standing rules should be relaxed, or that states should be granted *carte blanche* access to the federal courts. The point is simply that forcing quintessentially legal disputes—such as the statutory authorization for an executive program or that program's compliance with the APA—out of the judicial system has its own costs, and those costs may be reaching a critical point. When states satisfy traditional requirements for standing, either as directly injured parties or as *parens patriae*, the courts should not further tighten those requirements on the assumption that political remedies are always preferable. It is no longer sufficient to intone that "Article III courts do not exist to resolve the policy disputes between governments"<sup>149</sup> without explaining why legal disputes cease to be legal when they overlap with policy, or how a principle foreclosing interinstitutional litigation can be derived from Article III.

### III. "SPECIAL SOLICITUDE" AND THE ADVANTAGES OF STATE PUBLIC LITIGATION

I have argued so far that states will frequently have standing to challenge national action based on traditional standing principles, properly construed, and that special restrictions on state litigation are hard to justify. The con-

146 See Jason Silverstein, *Every Government Shutdown—and How Long They Lasted*, CBS NEWS (Jan. 4, 2019), <https://www.cbsnews.com/news/what-is-the-longest-government-shutdown-every-government-shutdown-and-how-long-they-last-ed/>.

147 Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEO. L.J. 109, 109 (2018).

148 See THE FEDERALIST NO. 78, at 522 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (famously describing the judiciary as "the least dangerous" branch).

149 Woolhandler & Collins, *Reining*, *supra* note 5, at 2031.

verse question remains, however: Should states have special *advantages* over other litigants?<sup>150</sup> What should we make of *Massachusetts v. EPA*'s suggestion that states are "entitled to special solicitude in our standing analysis"?<sup>151</sup>

I want to make two points about special solicitude. The first is that, to the extent that it exists, it is unlikely to take the form that most discussions seem to assume. Most discussions—including this one—focus on the nature of the interests that states can assert as a predicate to standing in an Article III court. But *Massachusetts v. EPA*'s analysis of that question rested on pretty traditional interests: the Commonwealth's proprietary interest as a landowner and the interests of its citizens that it could represent *parens patriae*. Lack of a traditional interest, in other words, was not the hump that Massachusetts needed special solicitude to get over. That hump, rather, involved the traceability and redressability elements of standing. Because climate change arises from so many sources, foreign and domestic; because reductions in U.S. greenhouse gases are simply one factor among many in mitigating its impacts; and because the relationship between climate change and particular impacts on, say, Cape Cod are extremely difficult to pin down, the traceability and redressability elements in *Massachusetts v. EPA* were extremely difficult. If Massachusetts got a break on account of being a state, it was surely on *that* point.

The special solicitude element of *Massachusetts v. EPA* thus goes to a somewhat lower-profile but very important debate in the Supreme Court's recent cases about probabilistic standing.<sup>152</sup> Litigants have sought to address uncertainty about where and with respect to whom a challenged activity's impacts will manifest by extending the sphere of the litigation—that is, by employing devices like class actions or organizational standing to ensure that the plaintiffs represent a broad enough group that *some* of them are sure to be injured by the challenged conduct. But so far, the Court has been quite skeptical of these attempts to overcome the probabilistic hurdle through aggregation.<sup>153</sup> *Massachusetts v. EPA* might be viewed as the first successful attempt to do so. If that is right, it is probably because of my second point, which is that states are a particularly attractive means of aggregating diffuse claims.

One of the most difficult problems in federal practice and procedure concerns the appropriate mechanisms for aggregating claims that affect large numbers of people but that individual litigants lack the incentives or the

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150 See, e.g., F. Andrew Hessick, *Quasi-Sovereign Standing*, 94 NOTRE DAME L. REV. 1927 (2019) (arguing that they should).

151 *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

152 Compare, e.g., *Clapper v. Amnesty Int'l USA*, 586 U.S. 398 (2013), with *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010).

153 See, e.g., *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (rejecting an attempt to aggregate a large number of plaintiffs by way of a large membership organization in order to challenge a U.S. Forest Service action of uncertain impact); *Allen v. Wright*, 468 U.S. 737 (1984) (rejecting an attempt to cure a similar probability problem by use of a nationwide class action).

wherewithal to pursue.<sup>154</sup> Standing doctrine often creates or exacerbates the aggregation problem. In the Texas immigration case, for example, the persons directly affected by DAPA were the unlawfully present aliens granted legal presence by its terms.<sup>155</sup> Those persons, of course, were unlikely to challenge the program. But the natural persons arguably injured by DAPA—the voters whose representatives voted for the federal statutes that DAPA arguably transgresses, the federal and state taxpayers whose resources will be diverted to pay DAPA’s significant expenses, or state citizens who may suffer a general deterioration in public services if those services are burdened by new entrants—lack individual standing under settled law because their interests are too diffuse.

Our law has adopted a number of solutions—such as class actions, multidistrict litigation, or organizational standing—as a means of aggregating claims that are impracticable to bring on an individual basis. For that reason, it is illusory to suppose that traditional suits by individuals are the most likely alternative to state litigation. But these aggregate mechanisms all have their problems, and none addresses the lack of individual standing when injuries occur to truly diffuse public interests. State litigation has been recognized as another potential solution to this aggregation problem,<sup>156</sup> and it may well be preferable to the alternatives in certain respects.<sup>157</sup> After all, states are empowered by state constitutions and the Tenth Amendment to represent the diffuse public interest of their citizens.<sup>158</sup>

One significant advantage that states have over private organizations and class actions is that they have built-in mechanisms of democratic accountability for their conduct of litigation on behalf of their citizens.<sup>159</sup> Justices of the Supreme Court have complained that the use of “private attorneys general”

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154 See, e.g., Lemos & Young, *supra* note 16, at 109.

155 See *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

156 See, e.g., *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 557 (1996) (identifying *parens patriae* actions by state governments as a form of representative litigation similar to class actions or suits by bankruptcy trustees); Lemos & Young, *supra* note 16, at 109–13.

157 See generally Crocker, *Organizational Account*, *supra* note 42 (comparing states to organizational litigants).

158 See, e.g., Hessick, *supra* note 150, at 1935–43 (exploring state authority to protect the public interest); James Tierney, *Several Significant Bipartisan Multistate Settlements that the Media Is Barely Covering*, STATEAG.ORG: TIERNEY BLOG (Jan. 7, 2019), <https://www.stateag.org/tierney-blog/2019/1/7/several-significant-bipartisan-multistate-settlements-that-the-media-is-barely-covering> (“At a time when the federal government literally has shut down, and when the media proclaims that partisanship is at an all-time high, state attorneys general continue to do extraordinary work on behalf of the public interest.”). The website stateag.org, founded by James Tierney, the prominent former attorney general of Maine, offers an invaluable sampling of the activities of state attorneys general. See STATEAG.ORG, <https://www.stateag.org/> (last visited Apr. 2, 2019).

159 See, e.g., Lemos & Young, *supra* note 16, at 113–17; Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?: Massachusetts v. EPA’s New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1784 (2008) (discussing checks on state litigation); Calvin Massey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249, 279 (2009).

to enforce federal law raises significant problems of public accountability, and similar concerns have been raised about the accountability of class counsel in class actions.<sup>160</sup> State officials who sue on behalf of their citizens *are* politically accountable for their actions, however. Recent attorney-general elections in Texas and Florida, for example, have featured public debate about the appropriateness of state participation in litigation challenging the Affordable Care Act.<sup>161</sup>

More generally, litigation by states fits well into a constitutional system predicated on the notion that no one person or institution can lay a unique claim to the public interest. Our system of both vertical and horizontal checks and balances recognizes that the public benefits when multiple institutions can step in if a particular officer or agency fails to pursue the public welfare or respect legal constraints.<sup>162</sup> Even in an area of strong national interest like immigration, the national Executive is not, and cannot be, judge in its own case. By according special solicitude to states' standing, *Massachusetts v. EPA* facilitated states' valuable role in the process by which every political institution is held accountable to the rule of law.

There are no guarantees, of course, that this role will not be abused. Although litigation by both red and blue states under the past two presidential administrations has made valuable contributions, it is hard not to look at the overall proliferation of state lawsuits with concern.<sup>163</sup> But this proliferation is hardly confined to state litigation, and it seems to be largely a symptom of broader maladies of polarized politics and, perhaps, an excess of adversarial legalism generally. It remains possible that the political and institutional checks on state litigation will, in time, return the system to a more satisfactory equilibrium. And it is worth remembering that those checks are considerably more substantial with respect to state litigation than elsewhere in public law.

## CONCLUSION

Our federal system at the dawn of the twenty-first century is quite different from the one envisioned by the Founders. And yet for all the Founders'

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160 See, e.g., *Fed. Election Comm'n. v. Akins*, 524 U.S. 11, 36 (1998) (Scalia, J., dissenting) (criticizing private attorneys general); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 788 (3d Cir. 1995) (noting concern about lack of accountability of class counsel).

161 See Chuck Lindell, *Texas Attorney General Greg Abbott Opposes Federal Government on Many Fronts*, AUSTIN AM.-STATESMAN (Sept. 1, 2012), <https://www.statesman.com/article/20120901/NEWS/309012625>; Jim Turner, *AG Candidates Shaw, Moody Square Off over Obamacare*, SARASOTA HERALD-TRIB. (Sept. 7, 2018), <https://www.heraldtribune.com/news/20180907/ag-candidates-shaw-moody-square-off-over-obamacare>.

162 See THE FEDERALIST NO. 28, *supra* note 128, at 179 (Alexander Hamilton) (observing that "the General Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the General Government").

163 See Lemos & Young, *supra* note 16, at 121–23 (worrying).



emphasis on enumerated powers and separate spheres of national and state activity, they also plainly envisioned a world in which states would both act in harness with national authorities and contest national actions that might be illegitimate. *That* world is still very much with us. And because so much of national policy and national controversy is driven by law and fought out in court, state public-law litigation has become a critical means by which states participate in the federal system. And because state litigants are both competent and accountable, they have the potential to play a unique and positive role in our broader system of public law.